IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10588 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE RAVI R. TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SAURASHTRA CEMENT LIMITED

Versus

UNION OF INDIA

Appearance:

MR BH CHHATRAPATI for Petitioner

MR MUKESH R SHAH for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE RAVI R. TRIPATHI

Date of decision: 16/01/2001

ORAL JUDGEMENT (Per : MR.JUSTICE B.C.PATEL)

Rule. Mr.M.R. Shah, learned advocate waives service of rule. At the request of learned advocates for the parties, the matter is taken up for final disposal.

2. The petitioner by filing this petition, has requested the Court to issue a writ of mandamus or any other appropriate writ, order or direction, quashing and setting aside the impugned order dated 25.7.2000 passed by respondent no.1, Annexure 'H' to the petition and permanently restraining the respondents from effecting recovery of the amount by way of Central Excise Duty and Penalty and/ or penalty on the basis of the show cause notice no.AR II/ GSCL-- EXP/ 95 dated 4.12.1995, Annexure 'C' to the petition and the order passed thereafter vide Annexure 'E' to the petition.

3. Vide the show cause notice, Annexure 'C' to the petition, the petitioner as well as Gujarat Siddhi Cement Limited, Siddhigram, Morasa (hereinafter referred to as "GSCL") were called upon to explain as to why penalty should not be imposed upon them for breach of Rule 173Q (d) of the Central Excise Rules, 1944 (hereinafter referred to as "the Rules") and also under Rule 173Q read with Rule 14A of the Rules. The show cause notice states that so far as GSCL is concerned, it was governed under Self Removal Procedure (SRP) under Chapter VIIA of the Rules. It is mentioned in the show cause notice that GSCL was an exporter of cement clinker falling under Sub heading No.2502.10 of Schedule to Central Excise Tariff Act, 1985. It is further mentioned in the show cause notice that GSCL filed Form No.AR4, four in number, under Rule 187A of the Rules on account of Saurashtra Cements Limited, Ranavav Merchant Exporter (the petitioner herein) before the Superintendent, Central Excise, AR II, Veraval which were accepted by the Assistant Commissioner, Central Excise, Junagadh, on different dates.

4. In para 4 of the said show cause notice, it is specifically alleged that the petitioner failed to furnish proof of export to the satisfaction of the Assistant Commissioner, Central Excise, Junagadh and it did not account for the quantity mentioned in the four different AR4 Forms, cleared under various invoices to the satisfaction of the Assistant Commissioner, Central Excise as provided under Rule 13. In view of this, a notice was issued calling upon the parties to the notice to explain as to why the parties should not be directed to pay an amount of Rs.45,96,974/-, by way of excise duty.

5. The Assistant Commissioner, after hearing the submissions and perusal of the record, in para 14 of the findings, arrived at a conclusion that the petitioner in the instant case instead of effecting export of the said goods by himself entrusted the said goods to another merchant exporter, Messrs Esteco V.K. Exports Ltd., Mumbai for export without following any procedure and without intimating their intention to do so to the authority with whom the bond is executed. In para 15 it was further held that the goods were handed over to another merchant exporter which resulted in sale of goods in domestic market and thus were subjected to Central Excise duty. According to Mr.M.R. Shah, for the Revenue, this was a case of home consumption and therefore, the petitioner was liable to pay excise duty on the goods. The matter was ultimately carried before the Joint Secretary to the Govt. of India exercising revisional jurisdiction. It was submitted before the Joint Secretary to the Govt. of India that there was no dispute about the export of clinkers. Bond for export was given by the applicant where goods were taken to the port (Okha). The ship which was to carry the cargo, did not arrive at all and since the cement being hygroscopic, cargo was handed over to another exporter for export, who had an export order. It was pointed out that since the goods were not meant for home consumption, the question of payment of excise duty did not arise. It seems that the Joint Secretary to the Govt. of India, relying on the provisions contained in Transfer of Property Act, 1882, arrived at a conclusion that there was a sale as there was transfer of ownership in exchange for a price paid or promised or part paid and part promised. No material has been placed before the Court indicating that there was a sale as indicated in the Sale of Goods Act for the sale of goods. Nothing is pointed out to this Court to substantiate the say of sale. On the basis of the show cause notice even finding is recorded to the effect that the goods were entrusted to another merchant exporter, Messrs Esteco V.K. Exports Ltd., Mumbai for export. Learned counsel Mr.S.B. Vakil pointed out that in para 4 of the show cause notice so far as the petitioner is concerned it is alleged as under:

"4. Whereas it appears that the second party has failed to furnish the proof of export to the satisfaction of the Assistant Commissioner, Central Excise, Junagadh and that the second party did not account for the quantity of aforesaid AR4s, cleared under the various invoices as enlisted in Annexure 'A', to the satisfaction of the Assistant Commissioner, Central Excise, Junagadh as provided under rule

13 of said rules read with Notification No.48/ 94 CE (NT) dated 22.9.94 as amended."

6. Mr.Vakil, learned counsel drew our attention to pages 20 to 27 of the petition, namely, four different AR4 Forms under Rules 158, 187 and 187A. It is very clear that the same were placed before the Superintendent, Central Excise by GSCL on account of Saurashtra Cement Ltd. The description of goods is given in the said forms. Each form is certified by the Customs Officer. The AR 4 Form contains certificate which reads as under (one of four forms) :

The certificate on one of the forms reads as under:

"Certified that the consignment was shipped under my supervision under Shipping Bill No.F/14 dated 7.6.95 by SS/ Flt No. .. which left on 17.5.95.

Shipping Bill No.F 20 dt.28.6.95 . .. .."

It is further mentioned that the consignment was duly identified and has passed the land frontier. The name of the vessel was mentioned as M.V. Jan Vivek, which sailed on 8.7.1995. Similar endorsements are made on other AR4s. Thus, it is very clear that from Okha Port, the goods as mentioned in four different AR4 Forms were shipped by GSCL on account of Saurashtra Cement Ltd, Ranavav. AR4 Forms are also signed by Saurashtra Cement Ltd. as authorised signatory. It is submitted that the agent was changed who did not clear the goods for home consumption but actually exported the goods and that fact is not disputed.

7. So far as the bond for export of all excisable goods (including by Registered Traders) except to Nepal and Bhutan is concerned, vide Annexure 'A' to the petition, a copy of the Notification has been placed. Relevant clauses (iii) and (iv) are as under:

"(iii) goods shall be exported within six months from the date on which these were cleared for export from the factory of manufacture or warehouse or within such extended period as the Commissioner of Central Excise (or Maritime Commissioner of Central Excise) may in any particular case allow;

(iv) such bonds shall not be discharged unless the goods are duly exported, to the satisfaction

of the Commissioner of Central Excise [or Maritime Commissioner of Central Excise] within the time allowed for such export or are otherwise accounted for to the satisfaction of such officer or until the full duty due upon any deficiency of goods, not accounted so, has been paid."

8. Relying on this, Mr.Vakil, learned counsel for the petitioner submitted that within the time prescribed, the goods were exported, proper account of the goods exported was given. It was specifically pointed out that as the ship was not available and the goods were required to be exported, the same were exported through another agent, who has never claimed any benefit whatsoever. There is nothing on record to show that there was a sale of the goods. Mere transfer of possession does not amount to transfer of ownership of the property in question. In absence of any evidence to satisfy that there was sale of goods, that is to say the property in the goods actually passed, the question of sale does not arise. It is not necessary that payment should be made first. Payment be made afterwards, but to say that there is a sale of goods, property in the the goods must be transferred. Even ownership may be transferred without transfer of possession. In the instant case, in absence of any material it was not proper to draw any inference with regard to sale. Merely export agent is changed it does not mean that there was sale and the inference of sale drawn by the respondents is without basis. Mr.Shah for Revenue contended that the manufacturer who has not exported the goods must pay the excise duty. He further submitted that the person who exported goods in this case can claim refund of excise as goods were exported. What is required to be noted is that goods were exported is not in dispute It is clear that goods were not cleared for home consumption. That aspect is clear from the certificate issued by Customs department in Form AR4.

9. Mr.Vakil, learned counsel drew our attention to Rule 14A, which reads as under :

"14A. Penalty for failure to furnish proof of export within the prescribed period --

Where any person who has removed excisable goods for export in bond in accordance with the provisions of rule 13 or 14, fails to export or to furnish proof of such export to the satisfaction of the Commissioner in the manner laid down in any notification issued under rule 12, he shall, upon a written demand being made by

the proper officer, forthwith pay the duty leviable on such goods, and shall also be liable to a penalty which may, subject to a maximum of two thousand rupees, extend to twice the amount of the duty, and until such duty and penalty are paid, the Commissioner may in his discretion refuse to permit such person to make further exports of excisable goods in bond :

Provided that nothing hereinbefore contained shall apply -

(a) to persons who have, after removal but before the export of goods, cleared the goods for home consumption in the manner provided in rule 52 or rule 157 or rule 173G as the case may be, or

(b) in respect of any unmanufactured products to which the provisions of Chapter VII have been extended and which, with the prior permission of the proper officer, have been rewarehoused in accordance with the provisions of these rules, or

(c) to persons who have otherwise accounted for such goods to the satisfaction of the Commissioner."

10. Proviso (a) makes it very clear that Rule 14A shall not apply to persons who have after removal but before export of goods clear the goods for home consumption in the manner provided in Rule 52 or Rule 157 or 173G as the case may be.

11. It is not necessary to refer Rules 52, 157 or 173G in detail. Rule 52 refers to clearance on payment of duty. Rule 157 refers to clearance of goods for home consumption. Rule 173G refers to the procedure to be followed by the assessee. If the argument of Mr.Shah is accepted that the goods were handed over for home consumption, then liability will be that of the manufacturer, GSCL and not of the petitioner. The petitioner being not a manufacturer of the goods, contended that that under the law, the respondents ought to have proceeded further with the manufacturer and ought not to have dropped the proceedings. The scheme of proviso (a), if read, it becomes clear that once the goods were cleared for home consumption as per the rules indicated hereinabove, then Rule 14A will not apply. In any case, Rule 14A will not apply in a case where the

persons who have otherwise accounted for such goods. In the instant case it is pointed out that the goods were exported from Okha Port. AR4 forms give the description of the goods and other details as required. It is certified by the Customs Officer indicating clearance of goods by the party concerned. Thus, the goods were exported. There is no dispute about the same. There is nothing on record to indicate that the goods were transferred by sale. That is to say the fact that the ownership of the goods was transferred, is not placed on record by necessary material. In view of this, it cannot be said that the petitioner has not accounted for such goods.

12. It is required to be noted that so far as GSCL is concerned the proceedings have been dropped at initial stage.

13. The petition stands allowed accordingly. The order dated 25.7.2000, at Annexure 'H' to the petition is hereby quashed and set aside. Rule made absolute to the aforesaid extent with no order as to cost.

(B.C. Patel, J.)

(Ravi R. Tripathi, J.)

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